

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Advanced Television Systems and)
Their Impact Upon the Existing)
Television Broadcast Service)

MM Docket No. 87-268

DOCKET FILE COPY ORIGINAL

To: The Commission

COMMENTS OF JOHNSON BROADCASTING, INC.

Johnson Broadcasting, Inc., licensee of KNWS, UHF Channel 51, Katy, Texas ("KNWS"), by its attorneys, hereby respectfully submits its Comments in the above-captioned proceeding, pursuant to the Commission's public notice released December 2, 1997, relating to the Ex Parte Submission of the Association for Maximum Service Broadcasters, Inc. ("MSTV") (The "Ex Parte Submission"). In regard thereto it is stated as follows:

I. **Consideration of the Ex Parte Submission is in the Public Interest**

As a general rule it is true that delay per se is not in the public interest. However, where, as here, the delay is slight and the reason for the delay is compelling then such slight delay is clearly in the public interest. A review of the Ex Parte Submission reveals that it presents a scenario containing only positive improvements to the table of proposed DTV allotments. Moreover, the MSTV filing is based on engineering studies that were not available when the DTV table of allotments was released in the Sixth Report & Order¹ on April 21, 1997.

¹ MM Docket No. 87-268, FCC 97-115 (the "Sixth R & O").

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KNWS supports the MSTV Ex Parte Submission because if the changes to the DTV table of allotments were made in the manner MSTV suggests, then KNWS's replication figure would improve from 82.1% to 99.2%. For an independent station operating in a highly competitive market, an improvement in replication to KNWS's coverage area of 17.1% is a significant improvement.

Moreover, a review of the MSTV filing indicates that not only are there no apparent losers, but indeed there are significant winners. As MSTV shows in the Ex Parte Submission, 8 million people would gain service² by reduction of interference and in the most egregious cases (see e.g. the case of WTVR, Richmond, Virginia) substantial loss of service to an area and population would be eliminated.

II. **History Should Not Be Repeated**

There are two practical reasons why the Ex Parte Submission should be considered in order to expedite the ultimate outcome of the DTV allocations proceeding.

First the mistakes which were subsequently found to be inherent in the original 1952 adoption of the table of television allotments³ should not be repeated. Second, where the FCC is faced with a situation where licensees will lose a considerable amount of service, that need not be lost in light of the evidence shown in the Ex Parte Submission, it can be presumed that these licensees will appeal and a Stay Order may be issued by the Court.

² See 47 USC §307(b).

³ Sixth Report & Order on Television Allocations, 1 P&F (RR) Reports 91:601 (1952), ("Original Sixth Report").

A) **The Mistakes Made in Adopting the Original Sixth Report Should Not Be Repeated.**

In 1948 many thought that nationwide television service was unrealistic because television sets were too expensive for most people to afford and the construction of new television stations extremely expensive. To turn possibility into reality, the FCC instituted a rulemaking to develop a television table of allotments eventually resulting in the Original Sixth Report. However, the Original Sixth Report made certain erroneous presumptions as to propagation. Chief of these was that a UHF station in a market could be in equal competition with a VHF station. The error of that engineering assumption soon became apparent and the FCC spent over a decade trying to straighten the problem out. Endless time and great expense was spent in this effort, see e.g. Second Report on Deintermixture, 13 P&F (RR) 1571 (1956).

If the Commission adopts a DTV table of allotments which takes away service from eight million people presently provided such service and substantially reduces replication to a number of stations another decade of litigation will surely follow. Another decade of rulemaking filings to correct this problem will occur. Here, the Ex Parte Submission presents the FCC with an opportunity to correct any error that may exist in the Sixth Report & Order before it becomes the progenitor of DTV service. Thus, where the Ex Parte Submission on its face makes numerous positive corrections to the DTV table of allotments, it should be considered for the simple reason that it will avoid the type of delay in the institution of new service that come about because of errors in the Original Sixth Report.

B) **If a Stay Is Issued by the Court Because of the Defects in the Sixth Report & Order, the Delay to the Introduction of DTV Service Would Be Considerable.**

It is true that the protections to a license against interference afforded by Section 316 of the Communications Act (47 USC §316) do not apply to propagation changes resulting from a rulemaking proceeding. That does not mean that the Commission may make such modifications without triggering appellate rights (see, 47 USC §402(b)(5)). Agency actions may not be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law....’⁴

Where a television licensee on appeal seeks a stay of the Sixth Report & Order pointing out to the Court that effectuation of the Sixth Report & Order without consideration of the Ex Parte Submission would result in substantial loss of service to the public, which effectuation of the Ex Parte Submission would preclude, the Court might well issue a stay. The Court has not hesitated to issue such a stay in such circumstances. See, e.g. MCI Telecommunications Corp. v. FCC, No. 96-1459 (D.C. Circuit February 13, 1997) in which the Court stayed the FCC’s detariffing rulemaking. As of this date, the Court has not even set a briefing schedule and the stay Order in that proceeding remains in effect.

III. **Conclusion**

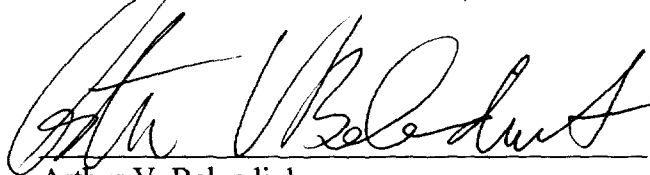
KNWS respectfully submits that it is in the public interest for the Commission to consider the Ex Parte Submission. History teaches us that a brief delay in order to

⁴ 5 USC §706 (2)(A).

properly consider a very controversial matter will in the end result in far less delay than a quicker decision adopting an erroneous conclusion.

Respectfully submitted,

JOHNSON BROADCASTING, INC.

A handwritten signature in black ink, appearing to read 'Arthur V. Belendiuk', written over a horizontal line.

Arthur V. Belendiuk

Robert W. Healy

Its Attorneys

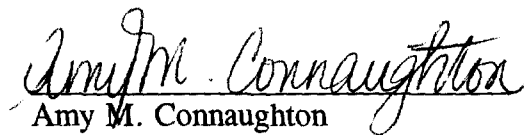
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December 16, 1997

CERTIFICATE OF SERVICE

I, Amy M. Connaughton, a paralegal in the law firm of Smithwick, & Belendiuk, P.C., certify that a copy of the foregoing Comments was on this 16th day of December, 1997, sent by first class mail, postage prepaid, to the following:

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